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No. 924

In the Supreme Court of the United States

October Term, 1957

MARY MACFADDEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

ROBERT N. ANDERSON,
SHELDON I. FINK,
Attorneys,
Department of Justice,
Washington 25, D.C.

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OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 29a-39a) are not officially reported. The opinion of the Court of Appeals (Pet. 17-21) is reported at 250 F. 2d 545.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1957. (Pet. 22.) An application for an extension of time within which to file a petition for a writ of certiorari was granted by Mr.

Justice Brennan on March 17, 1958, extending the time for filing to and including April 15, 1958. The petition for a writ of certiorari was filed on April 15, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the courts below properly found that periodic payments which were received by the taxpayer subsequent to a decree of divorce and which were in discharge of a legal obligation incurred by reason of the marital relationship were made under a written instrument incident to such divorce, so that the payments were includible in taxpayer's gross income under the provisions of Section 22(k) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * *

(k) [as added by Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such

decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

STATEMENT

The facts as found by the Tax Court (R. 30a-35a), may be summarized as follows:

Mary MacFadden (hereinafter called the taxpayer) and Bernarr MacFadden were married in 1913. They lived together as man and wife until April 7, 1932, on which date they entered into a separation agreement. (R. 31a.) The agreement provided in part that (R. 31a-32a):

> The provision herein made for the support and maintenance of the party of the second part [the taxpayer] is hereby expressly agreed to be in lieu of all alimony or suit money and the party of the second part expressly convenants and agrees to receive the said income from said trust in lieu of any such alimony or suit money, and hereby expressly covenants and agrees that so long as the conditions of this agreement are complied with by the party of the first part, she will not make any claim for alimony, counsel fee, or suit money, either for herself or for the children of the said marriage, in any action for divorce which she may commence against the party of the first part.

The support and maintenance referred to in the agreement was to be provided by the establishment of an irrevocable trust by Bernarr, and the trust was established as agreed. (R. 31a, 32a.)

In 1933, taxpayer brought suit to enforce payments due under the separation agreement. Bernarr, by way of countersuit, instituted divorce proceedings against taxpayer. These proceedings did not result in divorce. (R. 32a.)

On January 27, 1943, Bernarr filed suit for divorce from taxpayer in Florida. Taxpayer entered her appearance in this suit. The second amended bill of complaint therein recited that, at the time of the final separation of the parties, Bernarr created a trust fund for the support and maintenance of his wife during her lifetime. This recitation was admitted in taxpayer's answer. In the Special Master's report filed in the proceeding, it was noted that Bernarr had provided for the taxpayer pursuant to the separation agreement. (R. 32a-33a.)

On January 9, 1946, Bernarr was granted a final decree of divorce in the Florida proceeding. The decree contained the following provision (R. 33a):

> It appearing that support of the wife having been adequately provided for by separate agreement, no adjudication thereon is made but jurisdiction is retained to be exercised in event that subsequent developments justify further or other relief in respect thereto.

During the years 1946 through 1950, the trust realized income which, together with supplementary payments from Bernarr, was sufficient to make dis-

tributions to, or for the benefit of, taxpayer, totaling $15,000 per annum, and such distributions were in fact made. (R. 33a-34a.)

The Commissioner determined deficiencies in income tax against the taxpayer for each of the years 1946 to 1950 inclusive based upon the failure of the taxpayer to include the sum of $15,000 in gross income for each of such years. (R. 35a-36a.) The taxpayer thereupon petitioned the Tax Court for a redetermination. The Tax Court sustained the Commissioner's action (R. 36a) and the Court of Appeals unanimously affirmed (Pet. 17-21).

ARGUMENT

1. Section 22(k) of the Internal Revenue Code of 1939, *supra*, provides that a divorced wife receiving periodic payments subsequent to the decree of divorce, which payments are in discharge of a legal obligation imposed, because of the marital relationship, upon her husband under a written instrument incident to such divorce, shall include such payments in her gross income. In the intant case, the sole issue is whether the $15,000 periodic payments received by the taxpayer subsequent to the decree of divorce in 1946 were made "under a written instrument incident to such divorce."

The courts of appeals have consistently held that the question of whether a particular payment is or is not made "under a written instrument incident to" a divorce must be decided upon the basis of all of the surrounding facts and circumstances. Contrary to taxpayer's contention (Pet. 8-10), the subjective in-

tent of the parties as of the date of the agreement does not control. *Cox* v. *Commissioner*, 176 F. 2d 226 (C. A. 3d); *Lerner* v. *Commissioner*, 195 F. 2d 296 (C. A. 2d); *Feinberg* v. *Commissioner*, 198 F. 2d 260 (C. A. 3d); *Commissioner* v. *Miller*, 199 F. 2d 597 (C. A. 9th); *Newton* v. *Pedrick*, 212 F. 2d 357 (C. A. 2d); *Commissioner* v. *Moses*, 214 F. 2d 912 (C. A. 2d), certiorari denied, 348 U. S. 913; *Holt* v. *Commissioner*, 226 F. 2d 757 (C. A. 2d), certiorari denied, 350 U. S. 982. Taxpayer does not, and cannot, point to a conflicting decision by any court of appeals.

To be sure, the agreement for periodic payments which the husband and wife executed in this case was adopted at the time of their separation, years before they finally became divorced. Even if one assumes with taxpayer (contrary to the Tax Court's finding, R. 37a) that no divorce was in contemplation at the time the agreement was signed, the decision below is correct. When the separation was succeeded by divorce, the continuing periodic payments became incident to the divorce for the reason that such payments, from the beginning, were indisputably designed to serve as a substitute for support money—otherwise stated, as a discharge of all marital obligations. Indeed, the 1932 agreement between the McFaddens recites that it "is hereby expressly agreed" that the payments are "to be in lieu of all alimony or suit money" (*supra*, p. 3). The wife agreed, moreover, that, so long as the conditions of the agreement were met, she would "not make any claim for alimony, counsel fee, or suit money * * * in any action for divorce which she may

commence * * * (*ibid.*). In the course of the ultimate divorce suit, taxpayer perforce acknowledged that the trust fund which had been established pursuant to the earlier agreement was for purposes of discharging the obligation of support and maintenance. The Florida Court which granted the decree of divorce so treated it.

The basic Congressional purpose underlying Section 22(k), as the Court of Appeals observed (Pet. 21), is "to put the burden of tax payment upon the person who has enjoyed the income." And the reason for the provision that the obligation to make the payments shall be evidenced by the decree of divorce or by a written instrument incident thereto is "to insure adequate proof of the existence of the obligation when divorce has occurred" (Op. below, Pet. 20, quoting from *Lerner* v. *Commissioner*, *supra*, 195 F. 2d at 298). The statute accordingly requires that the periodic post-divorce payments here involved, having been received and enjoyed by the wife pursuant to a formal agreement which provided for the settlement of all of the husband's marital obligations, be treated as income to the wife.

2. Taxpayer also contends (Pet. 12-16) that the New Jersey Superior Court has held that the agreement involved herein did not provide for "alimony" within the meaning of New Jersey law. Assuming *arguendo* that such was the holding of the state court, Section 22(k) of the 1939 Code does not require that the payments received be technically designated "alimony"; it merely speaks in terms of "periodic payments" made in discharge of marital obligations.

For the purpose at hand, contractual payments in lieu of alimony stand on the same footing as alimony. Section 22(k), as declared in the pertinent reports, (S. Rep. No. 1631, 77th Cong., 2nd Sess., p. 83 (1942-2 Cum. Bull. 504, 568), and H. Rep. No. 2333, 77th Cong., 2d Sess., p. 72 (1942-2 Cum. Bull. 372, 427)) was designed to

> produce uniformity in the treatment of amounts paid in the nature of or in lieu of alimony regardless of variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

ROBERT N. ANDERSON,
SHELDON I. FINK,
Attorneys.

MAY, 1958.

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